Public Prosecutor v Shanmugam & Ors

HIGH COURT (KOTA BAHRU) — CRIMINAL REVISION NOS 43-1 OF 2001 AND 43-2 OF 2001
SURIYADI J
15 SEPTEMBER 2002

Criminal Procedure *— Coroner's inquiry — Whether decision subject to revision by High Court*

Criminal Procedure *— Revision — Application for — Deceased died in police shootout — Inquiry conducted by magistrate under s 337 of the Criminal Procedure Code — Verdict of magistrate that retaliatory shots fired by police was an act of self defence — Review of outcome of inquiry — Whether opinion of magistrate as to manner in which deceased came by his death could be reviewed — Whether verdict of magistrate should be set aside*

Criminal Procedure *— Court — Coroner's court — Nature of — Whether coroner's court a court of justice — Whether magistrate sitting as coroner bound by the usual rules of procedure and evidence*

On 3 October 1998 at about 9.30am, PW1 received information of a gun smuggling and drug trafficking racket from a source. That source also informed PW1 that a van, bearing registration number BEN 1788 type Nissan Vanette C22 would transport those illegal items. Nothing was said of the number of perpetrators, the race or sex. PW1 immediately set up two teams armed with all the necessary equipment including small firearms, in response to the information. Each team had a vehicle free of any police markings to transport them around. PW1 then set up an ambush next to a petrol station and waited for the van. When the van appeared, the police cars began to follow it. At some point of time, after PW1 had been unsuccessful in stopping the van despite being ordered to do so, PW1's police car cut across the path of the van. At about the same time, the second team's police car had blocked the van from the right side of the van. PW1 stated that he then heard shots coming from the direction of the van, and accordingly gave instructions to respond in kind. The exchange was only for 20 seconds. The van was stationary at that time. On the other hand, PW2, a police officer from the second team said that he heard shots only after he had stopped his vehicle with the shots coming from the direction of the van. He stated that his team began to reply in kind only after being directed by PW1. The persons who had died in the van were later confirmed to be government servants, a politician and RELA members. Four pieces of firearms and live bullets were also recovered from the glove compartment. Some of these live bullets were later subjected to tests with their casings tendered as exhibits. The evidence showed, inter alia, that: (a) the only shots came from outside the van as evinced by the damage to the van; (b) no spent cartridges were found in the van; (c) even though the police had seized some firearms, forensic investigations were not carried out to confirm whether they were used during the shootout; (d) the police cars were

A free of bullet holes and the police officers were not injured; (e) the dead persons had no criminal records; (f) an excessively large number of bullets was discharged by the police over a period of 20 seconds; and (g) the photographs failed to show any guns being clutched or seen anywhere near the dead persons even though their bodies had not been moved. The Magistrate of Tumpat had conducted an inquiry B under s 337 of the Criminal Procedure Code and came to the conclusion that the action of the police team to shoot back towards the direction of the van was an act of self defence and that the retaliatory shots fired by the police were reasonable. The magistrate further concluded that no criminal act had been committed emanating from the incident. The families of the six deceased persons filed the instant C petition to review the outcome of the inquiry.

Held, setting aside the verdict of the magistrate and substituting therefor a verdict of misadventure:

D (1) There was no reason why an opinion of the magistrate as to the manner in which the deceased came by his death may not be reviewed. So long as a miscarriage of justice had been committed by a magistrate, in that the correctness, legality or propriety of his findings were found wanting, a High Court judge was entitled to E invoke his statutory revisionary powers (see p 571A–B).

(2) The magistrate court had assumed the powers and duties of a coroner's court. A coroner's inquest was a court of law, though not a court of justice, because it was essentially set up to investigate and ascertain the cause of death. Apart from being F shackled by a limited mandate, a coroner was also not bound to follow the usual procedure of law courts. The position of the magistrate in the instant case was no different to that of a coroner when holding an inquiry of death, and thus, the magistrate was similarly not bound by the usual procedure of courts of law and the normal rules of evidence. A magistrate who conducted an G inquiry must however confine himself to the evidence made available to him, and decide on that evidence alone. If any verdict was based on probability and not on the established facts, that verdict must be quashed and an open verdict returned. (see pp 571D–E, 572A).

H (3) It was probable that as the sound of the shots came from the direction of the van, both teams of police officers in the two cars mistakenly construed that the shots (which actually came from their colleagues), were fired from within the van. This was so because PW1 and PW2, who were separate team members, admitted to not having fired the first shot and only did so after the I supposed need arose. With the dearth of evidence as to their state of mind, it was not possible to state whether criminality existed on the part of any of the police personnel (see pp 575G–H, 576A).

(4) What was incontrovertible was that the second team never discharged their firearms, until they had been ordered to do so by PW1. PW7 who was one of the team members of PW2 corroborated his superior, as he likewise only began to shoot after hearing PW1's directions. These two witnesses never saw gun flashes, even though it was dark at the site of the shooting. The conflicting pieces of evidence were more than sufficient to conclude that no shots had been proved conclusively to have been discharged from inside the van (see p 576D–F).

(5) In the instant case, no evidence was adduced as to whose bullets had actually caused the deaths of the six persons. PW1 testified that he had not discharged his 7.65 Walter whilst PW7 merely discharged once towards the direction of the van. The cause of death was the gunshots but what was uncertain was the exact identity of the culprit or culprits, and whether there was any criminality involved in the shootout. In the circumstances, since there was sufficient evidence to conclude as to how the deceased persons met their deaths, the verdict of the magistrate was quashed and substituted with a verdict of misadventure with the deceased persons being shot by person or persons unknown. However, the court was unable to conclude whether there was any outright criminality committed by any identifiable police personnel as there was also insufficient evidence for consideration (see pp 577B–C, 578B).

[Bahasa Malaysia summary

Pada 3 Oktober 1998 kira-kira pukul 9.30 pagi, SP1 menerima maklumat mengenai satu kegiatan haram penyeludupan senapang dan pengedaran dadah daripada satu sumber. Sumber tersebut juga memberitahu SP1 bahawa sebuah van dengan nombor pendaftaran BEN 1788 jenis Nissan Vanette C22 akan membawa barang-barang haram tersebut. Tiada apa disebut tentang bilangan, bangsa atau jantina penjenayah-penjenayah. SP1 telah dengan serta merta menubuhkan dua pasukan yang dibekalkan dengan segala kelengkapan yang perlu termasuk senjata api kecil, sebagai tindakbalas kepada maklumat tersebut. Setiap pasukan mempunyai sebuah kenderaan tanpa apa-apa tanda polis untuk mengangkut mereka. SP1 kemudiannya meletakkan satu pasukan serbuan di sebelah stesen petrol dan menunggu van tersebut. Apabila van tersebut muncul, kereta-kereta polis tersebut mula mengekorinya. Pada satu peringkat, selepas SP1 gagal memberhentikan van tersebut biarpun diperintahkan untuk berbuat demikian, kereta polis SP1 telah memotong jalan van tersebut. Kira-kira pada masa yang sama, kereta polis pasukan kedua telah menghalang van tersebut dari bahagian kanan kenderaan tersebut. SP1 menyatakan bahawa beliau kemudiannya terdengar bunyi tembakan dari arah van tersebut, dan dengan itu memberi arahan untuk membalas. Balasan tembakan

tersebut hanya berlaku selama 20 saat. Van tersebut tidak bergerak pada masa itu. Sebaliknya, SP2, seorang pegawai polis dari pasukan kedua berkata bahawa beliau terdengar tembakan hanya selepas beliau memberhentikan kenderaannya, dengan tembakan dari arah van tersebut. Beliau menyatakan bahawa pasukannya mula membalas tembakan hanya selepas diarah oleh SP1. Orang yang terbunuh dalam van tersebut kemudiannya disahkan sebagai kakitangan kerajaan, seorang ahli politik dan ahli-ahli RELA. Empat butir senjata api dan peluru hidup juga dijumpai dalam laci kereta. Beberapa butir peluru hidup kemudiannya telah diambil untuk ujian dan tutup pelindung peluru-peluru tersebut telah dikemukakan sebagai ekshibit-ekshibit. Keterangan menunjukkan, antara lain, bahawa: (a) tembakan-tembakan hanya datang dari luar van tersebut seperti yang ditunjukkan oleh kerosakan kepada van tersebut; (b) tiada kartrij sudah pakai dijumpai dalam van tersebut; (c) walaupun polis telah merampas beberapa senjata api, siasatan-siasatan forensik tidak dijalankan untuk mengesahkan sama ada mereka digunakan semasa tembak-menembak; (d) kereta polis tidak menunjukkan tembakan peluru dan pegawai polis tidak cedera; (e) orang yang terbunuh tidak mempunyai rekod jenayah; (f) bilangan peluru yang terlampau banyak dipakai oleh polis dalam jangkamasa selama 20 saat; dan (g) gambar-gambar tidak menunjukkan apa-apa senapang digenggam atau kelihatan berhampiran orang yang terbunuh walaupun mayat mereka tidak dialihkan. Majistret Tumpat telah menjalankan satu siasatan di bawah s 337 Acara Kanun Jenayah dan mencapai kesimpulan bahawa tindakan pasukan polis dalam menembak balik ke arah van tersebut merupakan satu tindakan mempertahankan diri dan bahawa tembakan pembalasan balik yang dilepaskan oleh pihak polis adalah munasabah. Majistret seterusnya memutuskan bahawa tiada tindakan jenayah telah dilakukan berpunca daripada kejadian tersebut. Ahli keluarga enam si mati memfailkan petisyen ini untuk mengkaji semula keputusan siasatan tersebut.

Diputuskan, mengetepikan keputusan majistret tersebut dan menggantikannya dengan satu keputusan nahas:

(1) Tiada alasan mengapa satu pendapat majistret tentang cara bagaimana si mati menemui ajalnya tidak boleh dikaji semula. Selagi kegagalan keadilan dilakukan oleh seseorang majistret, dalam ertikata kesempurnaan, kesahihan atau kewajaran keputusannya didapati kekurangan sesuatu, seorang hakim Mahkamah Tinggi berhak menggunakan kuasa semakan berkanun beliau (lihat ms 571A–B).

(2) Mahkamah majistret telah mengambil alih kuasa dan tugas sebuah mahkamah koroner. Inkues kematian oleh koroner merupakan satu mahkamah undang-undang, biarpun bukan mahkamah keadilan, kerana pada dasarnya ia ditubuhkan untuk menyiasat dan menentukan sebab kematian. Selain daripada dibelenggu oleh mandat yang terhad, seseorang koroner juga

tidak dikehendaki mengikuti prosedur biasa mahkamah undang-undang. Kedudukan majistret dalam kes ini tidak berbeza daripada kedudukan koroner ketika menjalankan siasatan kematian, dan justeru itu, majistret tidak terikat oleh prosedur biasa mahkamah undang-undang dan peraturan-peraturan keterangan lazim. Majistret yang menjalankan siasatan mestilah membataskan dirinya kepada keterangan yang dikemukakan kepadanya dan memutuskan atas keterangan itu sendiri. Sekiranya apa-apa keputusan adalah berdasarkan kemungkinan dan bukannya fakta yang terbukti, keputusan itu mestilah dibatalkan dan satu keputusan terbuka dikembalikan (lihat ms 571D–E, 572A).

(3) Adalah berkemungkinan bahawa oleh kerana bunyi tembakan datang daripada arah van tersebut, kedua-dua pasukan pegawai polis dalam dua buah kereta itu telah dengan salah mentafsirkan bahawa tembakan-tembakan itu (yang sebenarnya dilepaskan oleh rakan setugas mereka) dilepaskan dari dalam van tersebut. Ini adalah kerana SP1 dan SP2, yang merupakan ahli pasukan berasingan, mengaku tidak melepaskan tembakan pertama dan hanya berbuat demikian selepas keperluan kononnya timbul. Dengan ketiadaan keterangan mengenai keadaan minda mereka, adalah tidak mungkin untuk menyatakan sama ada unsur jenayah wujud pada pihak mana-mana kakitangan polis (lihat ms 575G–H, 576A).

(4) Apa yang tidak boleh dicabar adalah bahawa pasukan kedua tidak menembak senjata mereka, sehingga mereka diarahkan berbuat demikian oleh SP1. SP7 yang merupakan salah seorang ahli pasukan SP2 menyokong pegawai atasannya, kerana beliau juga hanya mula menembak selepas mendengar arahan SP1. Kedua-dua saksi ini tidak nampak pancaran senapang, walaupun ia gelap di tempat penembakan. Cebisan keterangan yang bercanggah lebih daripada mencukupi untuk memutuskan bahawa tiada tembakan telah dibuktikan secara meyakinkan telah dilepaskan dari dalam van tersebut (lihat ms 576D–F).

(5) Dalam kes ini, tiada keterangan telah dikemukakan tentang peluru siapakah sebenarnya telah menyebabkan kematian enam orang tersebut. SP1 memberikan keterangan bahawa beliau tidak melepaskan tembakan daripada senjata 7.65 Walter kepunyaannya manakala SP7 cuma menembak sekali ke arah van tersebut. Sebab kematian adalah tembakan senapang tetapi apa yang tidak pasti adalah identiti sebenar pesalah atau pesalah-pesalah, dan sama ada unsur jenayah terlibat dalam tembak-menembak tersebut. Dalam keadaan ini, oleh kerana terdapat keterangan yang mencukupi untuk memutuskan bagaimana mereka yang mati menemui ajal mereka, keputusan majistret dibatalkan dan digantikan dengan keputusan nahas dengan mereka yang mati ditembak oleh orang atau orang-orang yang tidak dikenali. Walau bagaimanapun, mahkamah tidak dapat

memutuskan sama ada wujudnya sebarang unsur jenayah yang dilakukan oleh kakitangan polis yang boleh dikenalpasti disebabkan keterangan juga tidak mencukupi untuk dipertimbangkan (lihat ms 577B–C, H, 578B).]

Notes

For cases on a coroner's inquiry, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1395.

For cases on applications for criminal revision, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2715–2719.

Cases referred to

Davies, Re (deceased) [1967] 1 All ER 688 (refd)
Hari Ram Seghal v PP [1981] 1 MLJ 165 (refd)
Loh Kah Kheng, Re (deceased) [1990] 2 MLJ 126 (refd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116 (refd)
R v Huntbash; ex parte Lockley [1944] KB 606 (refd)
R v South London Coroner; ex parte Thompson (1982) 126 SJ 625 DC (refd)
Richard Evans & Co Ltd v Astley [1911] AC 674 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 31
Criminal Procedure Code ss 311, 315, 316, 317, 323, 325(3), 328, 333, 337, 339, 341A
Penal Code s 19

R Ganavathy Naidu (*G Naidu & Partners*) for the appellant.
Azman bin Abdullah (Deputy Public Prosecutor) for the respondent.

Suriyadi J: On 3 October 1998 at about 9.30pm, the police received information pertaining to a van, type Nissan Vanette C22 bearing registration number BEN 1788, being used to smuggle guns and drugs at Pengkalan Kubor, exiting from Thailand. No information was received as to the exact number of illegal guns involved, the identity of the perpetrators, their race or sex. Acting on that scanty information, the police immediately formed two teams using two vehicles.

Armed with the necessary equipments, in the like of bullet proof vests, torchlights and light arms, they reconnoitered around the relevant place for sometime before stopping to lay in ambush, next to a Petronas petrol station. At about 11.40pm, the alleged van was spotted and the police shadowed it. At no time were their vehicles marked with any police insignia.

According to the evidence adduced, the first police vehicle had overtaken the van, and after a warning of 'Police!' had been given, had cut across the path of the van causing it to screech to a halt. At about the same

time, the other police vehicle blocked the van from the right side. It was at this juncture too that the first car had allegedly heard gunshots emanating from the direction of the van, followed by retaliatory shots from the police, after instructions to reply in kind had been issued. The exchange took place for about 20 seconds, with the police moving in towards the van, after ensuring that no movement was detected in it. In the van, they found two dead passengers slumped in the van and four dead persons outside it. All of them were male Indians. At the scene, the police found four pieces of firearms and an assortment of bullets.

Pursuant to the provisions of the Criminal Procedure Code ('the CPC'), after information has been received of the death of a person, a police officer will immediately proceed to the scene of the corpse, and thereon shall conduct an investigation. The duty of the investigating officer includes not only the preparation of a report on the apparent cause of death, but also to obtain and supply all the necessary information connected to that death. Subsequently, the officer in charge of the police district must forthwith transmit that report to the magistrate within the local limits of whose jurisdiction the body of the deceased was found.

The abovementioned magistrate, under s 333 of the CPC, if satisfied as to the cause of death, without the necessity of holding an inquiry shall report it accordingly to the public prosecutor. In any other case, excluding an inquiry pursuant to s 339 of the CPC, that magistrate shall proceed as soon as possible, to inquire 'when, where, how and after what manner the deceased came by his death and also whether any person was criminally concerned in the cause of the death' (s 337 of the CPC). The latter term of 'cause of death' under s 328 of the CPC, which has an extendable meaning, would include any ascertainable medical cause of death, death caused by any unlawful act or omission on the part of any person. Precedents have also extended unusual cases to be subject to inquiries (see *Re Loh Kah Kheng (deceased)* [1990] 2 MLJ 126 and *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116). The evidence heard will be recorded, and the magistrate's finding likewise will thereafter be transmitted to the public prosecutor. He thus when holding, or not holding a death inquiry, therefore must have done so pursuant to Chapter XXXII of the CPC (s 341A).

In this current case, the learned Magistrate of Tumpat had conducted an inquiry and came to the following conclusions on 22 May 2001:

> The court found that the action of the police team to shoot back towards the direction of the motor van, as an act of self defence, a reasonable act which would have been undertaken by any reasonable person caught in such a situation viz:
>
> (i) after receiving information of gun smuggling, using the said motor van; and
>
> (ii) shots had been fired from the impugned van.
>
> The court was of the opinion that the retaliatory shots fired by the police were acts of self-defence and were reasonable. The court was satisfied and concluded that no criminal act had been committed emanating from the incident which resulted in the death of the six relevant persons.

A This finding unfortunately caused consternation to the family of the six deceased persons resulting in a petition being sent to me to look into the matter, and if necessary to review the outcome of the inquiry.

The statutory mandate of the magistrate, with particular reference to the current one under discussion, as said under s 337 of the CPC, was to
B inquire:

(i) when;

(ii) where;

(iii) how;

(iv) after what manner the deceased persons came by their deaths; and
C

(v) whether any person was criminally concerned in the causes of the deaths.

Having perused the evidence, it was crystal clear to me that the position as regards questions i, ii, iii and iv above were as follows:

D (i) 3 October 1998 at about 11.40pm;

(ii) Pengkalan Kubor;

(iii) shot in a hail of bullets; and

(iv) after a shoot out with the police; and

(v) no.
E

It is trite law that the powers of revision (interchangeably, powers of review) are creatures of statute. Unless permitted by the scope of the promulgated provisions, the invocation of the powers will not be allowed. On that understanding, before proceeding with the review, if any, I had to overcome that first jurisdictional obstacle, ie whether the magistrate's inquiry
F finding could be subject to revision. Even if I were to invoke my powers of revision, it was principally to satisfy myself as to the correctness, legality or propriety of the finding arrived at by him (s 31 of the Courts of Judicature Act 1964 and s 323 of the CPC). Returning to the statutory mandate of the magistrate, if I were to invoke my powers, the follow up relevant
G question left for my consideration, which required some intense scrutiny, was to find out the causes of the six deaths, and decide inter alia whether they:

(i) could be categorized as misadventure, and person or persons known or unknown, were or were not criminally involved;

H (ii) were caused by natural causes;

(iii) were acts of God; or

(iv) an open verdict should be pronounced.

The bottom line in my exercise of the revisionary powers, if any, is to disturb the conclusions or findings of the magistrate, in order to do justice or
I correct any miscarriage of justice (see *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 and *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165). Wan Yahya J (as his Lordship then was) had occasion to opine in the latter case

at pp 166–168, when discussing provisions of revision that fell under Part VII that:

> The object of these provisions is to *correct any miscarriage of justice* arising not only from *error in judgment and procedure* but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence ...
>
> Any *mistake or flaw* in that machinery, which may have the possibility of injustice, *must be resolved in their favor.* (Emphasis added.)

The premise and scope of the above remark is sufficiently covered by s 325 of the CPC, which promulgates that a judge may, if the need arises, exercise any of the powers conferred by ss 311, 315, 316 and 317 of the CPC. As an example, under s 316 of the CPC, the judge may 'alter the finding, maintaining the sentence, or with or without altering the finding, reduce or enhance the sentence or alter the nature of the sentence'. Such pervasive powers which are quite similar, and additional to the powers exercisable in appeals, except for the conversion of an order of acquittal into one of conviction (s 325(3) of the CPC), surely is beneficial to the system of justice.

Section 328 of the CPC defines 'cause of death', as to include all matters necessary 'to enable an opinion to be formed as to the manner in which the deceased came by his death'. Certainly, an opinion must remain a lowly opinion and no more; it stands no higher than say, an order given by the court after due observation to send a person for psychiatric observations, before his plea is taken. It is indisputable too that in an inquiry where a suspect is not invited to participate, in the like of cross-examinations proceedings, what with the exercise not being 'inter partes', that opinion ultimately formed cannot be construed as a definitive judgment (s 19 of the Penal Code). By analogy to an inquest (with jury, under the old legal position), Lane CJ in *R v South London Coroner; ex parte Thompson* (1982) 126 SJ 625 DC had occasion to say:

> In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.

At the conclusion of an inquiry the learned magistrate may deliver the finding of death by misadventure (caused by, eg accident, struck by lightning, drowning, suicide, or death caused by person or persons unknown as a result of lawful or unlawful intentional and or unintentional act culminating in unforeseeable death), death caused by act of God, death caused by natural causes and open verdicts. As for the latter verdict, where there is insufficient evidence to bring in any of the other verdicts, then open verdict must be adverted to.

Armed with all the above reasons, I was satisfied that the statutory revisionary powers conferred on a High Court judge, are wide enough to permit me to decide as to whether a revision could lie against the findings

of a magistrate in an inquiry, such as this. Furthermore on reflection, if a matter under appeal which has a definitive judgment, could be converted into a revision and be subjugated to the full powers of a judge's reviewing powers, I see no reason why *an opinion* which is not final, may not be reviewed. So long as a miscarriage of justice had been committed by a magistrate, in that the correctness, legality or propriety of his findings were found wanting, a High Court judge thus was entitled to invoke that power. So, in this case, was there any miscarriage of justice either from error in judgment and procedure, or even neglect committed by the presiding magistrate, which required interference by me?

To arrive at a correct conclusion, it is essential that I resolve a specific preliminary issue first, ie whether a magistrate who conducts such an inquiry under discussion, is bound by the normal rule of evidence. I will begin by stating that in a gist, due to the various amendments to the Criminal Procedure Code (Amendment) Act, the Courts Act 1948, the Courts (Amendment) Act 1950 and finally the substantive FMS Criminal Procedure Code being amended by Act 324/76 making it applicable to the whole of Malaysia, and repealing all the other statutes governing inquests or death inquiries, the magistrate court now has assumed the powers and duties of a coroner court. It had always been accepted that a coroner's inquest was a court of law, though not a court of justice, as it was essentially set up to investigate and ascertain the cause of death. Apart from being shackled by a limited mandate, a coroner was also not bound to follow the usual procedure of law courts. With the abovementioned statutory amendments, the position of a magistrate now is no different to the archaic coroner when holding an inquiry of death, and thus similarly not bound by the usual procedure of courts of law. In *Re Loh Kah Kheng*, Mohamed Dzaiddin J (as his Lordship then was) when reviewing an inquiry had in crystal clear terms remarked at p 128:

> I am, therefore of the opinion that so long as the learned magistrate was satisfied that there was evidence, *in whatever form or manner elicited and whether admissible or not*, which could assist her in establishing the cause of death of the deceased, she was perfectly entitled to know and take cognizance of it. (Emphasis added.)

Under holding (5) of the above case, is also authored (at p 126):

> The function of a magistrate in holding an inquiry of death is to inquire, inter alia, whether any person is criminally concerned in the cause of death. The inquiry is to be held by examining witnesses on oath and the *magistrate may admit any evidence* which he thinks fit, *especially hearsay evidence.* His duty is to ascertain the cause of death and *he is not bound to follow usual procedure.* (Emphasis added.)

In spite of that clear enunciation, in that a magistrate is not bound by the usual procedure, the eventual verdict is a different story. A magistrate who conducts an inquiry must confine himself to the evidence made available to him, and at the end of the day decide on that evidence alone (*Richard Evans & Co Ltd v Astley* [1911] AC 674). Guesswork is certainly out. If any verdict is based on probability and not on the established facts that verdict must

certainly be quashed and an open verdict returned. In *R v Huntbash; ex parte Lockley* [1944] KB 606, Viscount Caldecote CJ had remarked at p 608:

> Objection is taken to the finding of the coroner on the ground that there was no evidence to support it, and that is the only point in this case ...
>
> It is *not probability*, however which determines verdicts, but proved facts, and, *if facts* which justify a specific verdict are not proved at an inquest, there is no alternative but *to return an open verdict.*
>
> As a *coroner is bound by evidence* and can find only facts which are proved in evidence and are *not the result of guesswork*, I think that here the coroner was betrayed into a mistake in the verdict which he arrived. (Emphasis added.)

To put it succinctly if the evidence is not available, and the verdict of misadventure, death caused by natural causes or act of God is not possible then the last resort for the learned magistrate would have been an open verdict.

Testimony of witnesses

PW1

On 3 October 1998 at about 9.30am, this witness had received information of a gun smuggling and drugs trafficking racket from a source. That source also informed him that a van, bearing registration number BEN 1788 type Nissan Vanette C22 would transport those illegal items. Nothing was said of the number of perpetrators, the race or sex. As he was the man in charge of the serious crimes unit, he immediately set up two teams armed with all the necessary equipments including small firearms, in response to the information. Each team had a vehicle free of any police markings to transport them around. He set up an ambush next to a Petronas petrol station and waited for the criminals.

After having waited patiently, the van appeared and they shadowed it. At some point of time, after PWI had been unsuccessful in stopping the van despite being ordered to do so, and even though the word 'Police!' had been uttered, had unhesitatingly cut across the path of that vehicle. He also testified that at about the same time, the other police vehicle had blocked the van from the right side of the van. At about that time too PW1 heard shots coming from the direction of the van, and accordingly gave instructions to respond in kind. The exchange was only for 20 seconds. After ensuring that no movements were detected in the van, the police team approached it. There they found six dead male Indians, later to be confirmed as government servants, a politician and RELA members. Four pieces of firearms and live bullets were also recovered from the glove compartment. Some of these live bullets were later subject to tests with their casings tendered as exhibits.

PW2

On 3 October 1998, ie on the date of the incident this witness was instructed to assist PWI who was to lead the first team. He was to lead the

second team in vehicle number WDS 1662 type Proton Wira. Much of his testimony was quite similar to that of PW1. He admitted that his car had blocked the right side of the van, with the two vehicles separated by ten meters. At the juncture of ordering his men to alight, he heard shots coming from the *direction* of the van, followed by a shout from PW1 to shoot at it. Strangely enough, even though he heard shots coming from the van, he was unaware of flashes of gunfire from it.

PW3

He is the chemist who confirmed that the holes found in the van were bullet holes, which came from outside the van. He found no bullets in the van. He also checked the four firearms brought by the police. He was also asked to do a test on a gun type 'Unique', but failed to do so as he was not supplied with the necessary bullets and magazine that went along with it. Yet, PW2 clearly said that at the scene a gun of 'Unique' make was recovered, with one bullet still in the chamber and five in the magazine.

PW4

He is the pathologist who did the necessary autopsy on all the six deceased persons. He confirmed that they had multiple shot wounds in the heads and bodies, which had resulted in their deaths. Interestingly enough, this witness had testified that when checking all the bodies, he found the shots were 'all directed at the heads'. It makes me wonder how, if there was pandemonium let alone it being dark, the police could have managed to shoot at such small mobile targets, so successfully in 20 seconds.

PW5

He is an armourer. He successfully tested four pieces of firearm viz a revolver .38 special, two homemade guns and a pistol, type 'Unique'. He admitted that he was directed primarily to test on the serviceability of those guns and not on whether they had been used recently. In fact, he never even received the spent cartridges of P2A–D and thus never carried out any forensic tests on them.

PW6

He is another armourer. He also received the relevant firearms with the instruction to check on the serviceability only. He admitted that he was never required to check on whether the guns had been fired previously.

PW7

He is a police officer and had attended PW1's briefing. He was in the same vehicle with PW2. He confirmed much of the evidence of the latter. He never even bothered to look at the deceaseds and had left immediately thereafter. This witness, departing from the evidence of the others, testified that at the time when he heard the shots, the van was still moving. He

admitted that, 'he was unable to take aim' due to the pandemonium. He further admitted that 'he saw no gun flashes' from the van. A

PW8

He was the photographer who took photographs within minutes after the incident. Why he, in the middle of the night, had tagged along during that incident as if in anticipation of a shootout, remained a mystery to me. I am sure the police standing instructions require that an arrest be attempted first in a normal situation, and not shoot first and question later. B

PW9 C

This is the police personnel who helped to carry the corpses into the police vehicles, and also ensured the security of the place of incident.

PW10

He is another photographer who took two photographs at the place of incident. D

PW11

He is the investigating officer of this case. He merely confirmed that he saw the corpses and the impugned guns. He testified that he did not know how the incident occurred. He admitted not finding any spent cartridges in the van. E

PW12

He is the second investigating officer who had taken over from PW11. He admitted that he made no attempts to find out whether the guns had been used in the incident. He confirmed that the police had fired 47 shots and 37 had struck the deceased persons. F

Observations G

Having perused the magistrate's decision, I was beset by these factual questions, viz:

(i) why were there only shots coming from outside the van as evinced by the damage to the van;

(ii) why were there three holes found at the rear; H

(iii) why were there no spent 'Unique' cartridges found in the van, bearing in mind that PW1 had said that spent cartridges from type 'Unique' would be flung insitu;

(iv) why did the police fail to investigate the probability of shots coming from inside the van. Was it deliberate? No doubt three bullet holes were found to have exited the van, but even these pieces of evidence caused some disquiet in me, as shooting onto the walls of the van from I

A inside, would have been a silly act at best, apart from the fact that it was never proved that shots had been fired from within;

(v) why, even though the police had seized some firearms, no forensic investigations were carried out to confirm whether they were used or not during the shootout. Even if there were spent cartridges in the B chambers of the guns, why were no investigations carried out to confirm whether they were indeed used up during that shoot out and not during some unrelated time. Even a rookie police officer would know that would be among the very first matter which ought to be investigated;

(vi) why were the police cars free of bullet holes, if indeed the six dead C persons had fired at the police, especially when the alleged weapons used had a 'spraying effect';

(vii) why were six dead persons who had no criminal records and comprising government servants, a politician, and RELA members suddenly confronted by such a murderous assault;

D (viii) why if it were true that shots were fired by the deceased persons with four of them being trained RELA members and in possession of weapons which 'sprayed bullets', none of the police personnel were injured;

(ix) why if the police were sharpshooters, such an excessively large number E of bullets, numbering 47, were discharged in 20 seconds;

(x) why if the bodies had not been moved, and shots had been fired by the deceased persons, the photographs failed to show any guns being clutched or even seen anywhere near them; and

(xi) how in that pandemonium, and when mobility was the order of the F day, had the police been successful in targeting their heads?

Having considered the scanty evidence adduced by the deputy public prosecutor, the following conclusions could also be arrived at by the learned magistrate:

G First probability

Rejecting a merciless and cold blooded killing theory of the six persons, as there was no evidence to that effect, and as there was no concrete evidence to show that any shots came from the van (thus rejecting the finding of fact), it was probable that as the sound of the shots came from the direction of the H van, both teams must have deduced that the shots which actually came from their colleagues, were mistakenly construed as to have come from the van. This was so as PW1 and PW2, who were separate team members, admitted not firing first and only did so after the supposed need arose. This was probable as PW1 did say that the shots came from the direction of the van (and not from inside the van). The second police team was positioned I beside the van, and vis-à-vis the position of the first team, it was positioned in the direction of the van. Hearing those shots and misconstruing them, PW1's team must have reacted in that disastrous manner.

The same argument likewise would be equally applicable to the second team's stance. Despite this view, I must state that these are all probabilities, as there were no established facts as to their state of mind at that material time, to substantiate it. With the dearth of evidence as to their state of mind, I certainly would be unable to allege whether any criminality existed on the part of any of the police personnel or not. I do not wish to dabble in guesswork.

Second probability

Apart from the above 'first probability', I was also confronted by some rather conflicting evidence, which stared at me, ie in relation to when the shooting episode began. In terms of sequence, prior to the supposed order to shoot by the police, PW1 clearly stated that he heard shots coming from the direction of the van first, before giving the orders to shoot. At that time the van was stationary. PW2 on the other hand said that he heard shots only after he had stopped his vehicle, with the shots coming from the direction of the van. His team began to reply in kind only after being directed by PW1. If this witness discharged his firearm only after having been ordered to, why did PW1 then say that there already were gunshots coming from the direction of the van (on the premise that there were no shots coming from inside the van)? What was incontrovertible was that the second team never discharged their firearms, not until they had been ordered to do so. PW7 who was one of the team members of PW2 corroborated his superior, as he likewise only began to shoot after hearing PW1's directions. These two witnesses never saw gun flashes, even though it was dark at the site of the shooting.

The conflicting pieces of evidence, read together with all those questions I posed above, were more than sufficient reasons for me to conclude that no shots had been proved conclusively to have been discharged from inside the van.

So, who shot first? Team 1 or team 2? Apart from the latter two questions, I was also beset by the logical consequential questions, viz:

(i) Who was lying, PW1, PW2 or PW7?

(ii) Were all three lying in some way or other, acting in concert to cover up the criminal negligence or excessive force that had been used in the circumstances of the case?

(iii) Even if it were true that firearms had been discharged from inside the van, why must there be major differences in the evidence of the main police witnesses;

(iv) What happened to the other five police witnesses who participated in the botched operation?

(v) If no shots had been conclusively proved to have come from inside the van, how could the learned magistrate have justifiably conclude that the police action of accurate discharging of an excessively large number of bullets were acts of self defence in the circumstances of the case?

A To reiterate, when conducting an inquiry a magistrate must confine himself to the evidence and arrive at a specific verdict based only on the established facts pursuant to s 337 of the CPC. Probabilities and guesswork can never be the basis for that specific verdict. If the evidence does not reach the required standard, to enable the learned magistrate to reach a verdict of misadventure, or death caused by natural causes or act of God, then an B open verdict would be the last resort. The latter verdict must not be adverted to if the uncertainties are very minor, but the availability of evidence is there to show how the deceased person came by his death.

It was indisputable that no evidence was adduced as to whose bullets actually caused those deaths, eg PW1 testified that he never even discharged C his 7.65 Walter whilst PW7 merely discharged once, and even that towards the direction of the van. Yet six persons died. Here the cause of death was the gunshots, and on that aspect there was no uncertainty. What was uncertain was the exact identity of the culprit or culprits, and whether there was any criminality involved in the shootout.

D With so many questions left unanswered as illustrated above, and no confirmatory or established facts available for the consideration of the learned magistrate, the finding of the latter as regards culpability and the overall order generally, apart from the dearth of conclusion on the cause of death, was certainly difficult to appreciate.

E Expanding from there, I was quite stunned by the format of the magistrate's decision as it bordered on the preparation of the defense of the police over zealousness. In fact it was not a decision that could be construed as a verdict but a ground of decision, based on a non-verdict. At worst he could have merely recorded that the deaths were caused by misadventure, as a result of multiple shot wounds on the heads and bodies, but F unfortunately had failed to do so. It must be borne in mind that if there were to be uncertainty on certain parts of the inquiry, like when or where he died etc, but with there being sufficient evidence to record how he died, a verdict of misadventure must be handed down. If in the case of *Re Davies (deceased)* [1967] 1 All ER 688 death caused by sleep walking hence an accident, could justify a verdict of misadventure, surely in this case it was more than G qualified to be categorized as such. Even the very basis of the finding, that no criminal act had been committed seemed to be founded on shaky grounds, as that conclusion went against the grain of the evidence. As dissected earlier, there was no cogent proof to confirm of any shots having been fired from the van vis-à-vis the accurate shots of the police.

H At the end of the day even though there were many ifs and questions badgering me, but as there was sufficient evidence to conclude as to how the deceased persons met their deaths I had no hesitation in quashing the verdict of the learned magistrate, and substituting it with a verdict of misadventure with the deceased persons being shot by person or persons unknown. Due to the insufficiency of evidence before the court to convict I any person or persons in the shootout, the conclusion of 'being shot by person or persons unknown' (as insufficient evidence were made available to court to decide whose bullets killed them), must be alluded to. These two

ingredients in the verdict are included as under s 328 of the CPC, 'cause of death' includes not only the apparent cause of death ascertainable by inspection or post mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death, and as to whether his death resulted in any way, or was accelerated by, any act or omission of any other person. Regretfully, I was unable to conclude whether there was any outright criminality committed by any identifiable police personnel, as there was also insufficient evidence before me for consideration.

In conclusion, I must reiterate that after invoking my revisionary powers and after reviewing the evidence, the decision of the learned magistrate was set aside and substituted with a verdict of misadventure, with the deceased persons being shot by person or persons unknown.

Verdict of magistrate set aside.

Reported by Lim Lee Na